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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL BARTON,

Defendant and Appellant.

E064288

(Super.Ct.No. FSB1405457)

OPINION

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell IV, Judge. Reversed with directions.

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore M. Cropley and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Miguel Barton appeals after he was convicted of one count of receiving stolen property. Defendant asserts that the trial court committed error

in the sentencing, because it imposed a second strike sentence after finding the prior strike allegation untrue. The court also improperly calculated the statutory restitution fine based on the erroneous sentence. The People agree that the court erred, but point out some discrepancies in the trial court's findings. Accordingly, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

The victim, Reuben Gonzales, reported his minivan stolen on December 6, 2014. The next day, a few blocks away from the victim's residence, a police officer found defendant sleeping in the minivan. Defendant claimed that a friend of his owned the minivan, but he did not name the friend. The officer noticed that the ignition was stripped.

Defendant was arrested and charged by amended information with one count of receiving stolen property (a motor vehicle), and one count of unlawfully taking and driving an automobile. These were pleaded in the alternative. The amended information also alleged that defendant had two prior strike convictions (robbery) in 1988 and 1993, as well as six prior prison terms.

At trial, the victim testified that defendant did not have permission to take his minivan. He valued his minivan at \$2,000 to \$2,500.

The jury found defendant guilty on count 1, receiving stolen property. In a separate proceeding, the trial court found defendant's two strike allegations not true. The court found three prior conviction allegations true, and three not true.¹

¹ The first amended information alleged two prior strikes: A 1993 robbery conviction (case No. FSB00142) and a 1988 robbery conviction (case No. SCR46757)

The first amended information also listed six prior conviction enhancement allegations under Penal Code section 667.5, subdivision (b): The two robberies described above, and a 1990 conviction for being a felon in possession of a firearm (case No. SCR51837, former Pen. Code, § 12021, subd. (a), now Pen. Code, § 29800), a 2000 conviction of possession of cocaine base (case No. FSB027677, Health & Saf. Code, § 11350, subd. (a)), a 2008 conviction for unlawful taking of a motor vehicle (case No. FSB801193, Veh. Code, § 10851, subd. (a)), and a 2014 conviction for attempted unlawful taking of a motor vehicle (case No. FSB1304937, Pen. Code, § 664; Veh. Code, § 10851).

At the separate trial on the prior conviction allegations, the prosecutor presented defendant's rap sheet, defendant's department of corrections history, and several certified prior conviction packets (Pen. Code, § 969b, prima facie proof of a prior conviction). The Penal Code section 969b packets covered case Nos. FSB264976 (codefendant's case No. related to SCR46757, the 1988 robbery), FSB027677 (2000 conviction for possession of cocaine base), FSB801193 (2008 conviction for unlawful taking of a vehicle), and FSB1304937 (attempted unlawful taking of a vehicle).

The trial court found no packet was submitted for the 1993 robbery, so found the strike not true. The packet for the 1988 robbery included a docket sheet bearing the name and case number for defendant's codefendant, an information charging both defendant and his codefendant with two counts of robbery and one count of drug possession, and the felony complaint in that case. The court again found no proof within the packet of defendant's conviction of the 1988 robbery, and found the strike allegation not true.

As to the enhancement prison term priors, the trial court found the 1988 robbery true (case No. SCR46757). It also found true the 2000 conviction of possession of cocaine base (case No. FSB027677), and the 2008 conviction for unlawful taking of a motor vehicle (case No. FSB801193).

[footnote continued on next page]

At a later sentencing hearing, the court entertained an oral request from defense counsel to exercise its discretion to dismiss the 1988 robbery strike prior. The court declined to dismiss the strike prior. It appears that both counsel and the court were misled by the true finding of the 1988 robbery prior as a prison term enhancement prior; the court had earlier expressly found the 1988 conviction not true as a strike prior. The court imposed a state prison sentence of three years (the aggravated term), doubled because of a strike, for a prison term of six years; the court added three one-year enhancements for defendant's prior prison terms, for a combined total of nine years in state prison. The court made further orders as to custody credits, and fines and fees to be imposed. Among other things, the trial court ordered a restitution fine of \$2,700, based upon the minimum restitution fine of \$300, multiplied by the number of years of the sentence (nine years). (See Pen. Code, § 1202.4, subd. (b).)

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The court found not true the 1990 conviction for being a felon in possession of a firearm (case No. SCR51837); no packet for that conviction was in the exhibits. Similarly, no packet was submitted for the 1993 robbery conviction (case No. FSB00142), so the court found that enhancement allegation not true. Finally, the court found not true the 2014 conviction for attempted unlawful taking of a motor vehicle (case No. FSB1304937). The packet materials submitted with that exhibit included only some minute orders for defendant's release and a notice to the sheriff of defendant's commitment to custody, together with a fingerprint card, an FBI information sheet, an inmate movement sheet, and an undecipherable photocopy of a photograph. There was no record of the case documents (e.g., information, verdicts, abstract of judgment) included in the packet.

Defendant now appeals, asserting that the trial court erred in imposing a doubled prison term for a prior strike: defendant had found both alleged strikes not true.

ANALYSIS

I. The Trial Court Erred in Imposing a Second-strike Sentence Based on a Strike It Had Found Not True

Whether the trial court imposed an unauthorized sentence is an issue of law, to be reviewed independently by the appellate court. (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

Here, the court had plainly ruled at the trial on the prior conviction allegations that the two strike priors had not been proven beyond a reasonable doubt. In the absence of a true finding as to the prior conviction (strike) allegation, imposition of a second strike sentence was unauthorized, and must be reversed. (See *People v. Miller* (2008) 164 Cal.App.4th 653, 668 [where trial court failed to conduct a court trial or make any findings as to an enhancement allegation, sentence imposed based on the enhancement was unauthorized and must be reversed].) Double jeopardy protections do not apply to the trial of prior conviction allegations. (*Ibid.*) Therefore, it may be appropriate to remand for a court trial of prior conviction allegations, and for resentencing. (*Ibid.*)

As noted, retrial of prior conviction findings is not precluded by double jeopardy when reversed for lack of substantial evidence (*People v. Monge* (1997) 16 Cal.4th 826, 839-843), but at any retrial, the People are obligated to present additional evidence beyond that found to be insufficient at the first trial (*People v. Scott* (2000) 85 Cal.App.4th 905, 908).

The People argue that remand is appropriate here, because of inherent confusion in the record. At the court trial on the prior conviction allegations, the trial court found the 1988 robbery conviction (case No. SCR46757) not true as a strike allegation, but found the same conviction true as a prior prison term enhancement allegation. The probation report recommended the sentence the trial court ultimately imposed; i.e., the probation officer failed to note that the strike had been found not true. The minute order for the trial of the prior conviction allegations stated that the allegation in “case ending in 6757 is true.” The People contend, with some justification, that it was unclear whether the trial court intended to find the 1988 robbery prior strike and the prior prison term enhancement both true or both not true. Defendant replies that the considerations as to each allegation are different: a true finding of a strike prior requires proof beyond a reasonable doubt that a defendant has been convicted of one or more qualifying serious or violent felonies. (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1193-1194.) A true finding of a prison term prior requires only proof that a defendant has served a prior prison sentence for a felony. Thus, defendant argues, finding a prison term prior true, but finding a strike allegation based on the same conviction not true, are not necessarily inconsistent.

Defendant agrees, however, that the matter should be remanded for retrial on the 1988 robbery conviction as both a strike and a prison term prior. After such retrial, the trial court should resentence defendant in accordance with whatever new findings the court may have made.

II. The Restitution Fine of \$2,700 Should Be Reversed

The trial court ordered a restitution fine pursuant to Penal Code section 1202.4, subdivision (b), of \$2,700, consisting of a base fine of \$300, multiplied by the number of years of defendant's sentence (nine years). Because the sentence imposed was unauthorized, the calculation of the restitution fine was based on an unauthorized criterion (doubled prison term based on a strike allegation found not true). The restitution fine order must therefore also be reversed. The matter is remanded for further proceedings: following a retrial of the 1988 robbery conviction allegations (strike and prior prison term), and imposition of a new sentence based on the findings made, the trial court shall recalculate the appropriate restitution fine based on the sentence ultimately imposed after retrial of the prior conviction allegations.

DISPOSITION

The imposition of a second strike sentence was unauthorized. The imposition of a restitution fine based upon the unauthorized sentence was also improper. The sentence is reversed and the matter remanded for a retrial of the 1988 robbery conviction, both as a strike prior and as a prior prison term enhancement. The trial court shall impose a new sentence based on the new findings upon retrial, and shall recalculate the restitution fine to be imposed as a result of the new sentence.

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McKINSTER
_____ J.

We concur:

RAMIREZ
_____ P. J.

SLOUGH
_____ J.